

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TRICIA REYES-AGUILAR and EDWARD AGUILAR,) Case No. 12-3100-SC
Plaintiffs,)) ORDER GRANTING MOTION TO
v.) DISMISS
BANK OF AMERICA, N.A. (aka BAC)
HOME LOANS SERVICING, LP), and)
DOES 1 through 50, inclusive,)
Defendants.)

)

I. INTRODUCTION & BACKGROUND

20 Plaintiffs Tricia Reyes-Aguilar and Edward Aguilar
21 ("Plaintiffs") bring this action in connection with alleged acts
22 and omissions occurring at the origination of their refinanced home
23 loan. ECF No. 1 ("Not. of Removal") Ex. A ("Compl.").
24 Specifically, Plaintiffs allege that Defendant Bank of America,
25 N.A. ("Defendant" or "BofA") -- or one of its predecessors-in-
26 interest -- induced them to accept an "unsuitable and risky loan"
27 by, among other things, failing to "clearly and conspicuously"
28 disclose how much and how soon their interest rate and monthly

1 payments would increase after their teaser rate expired. Id. ¶ 15.
2 Plaintiffs assert five causes of action: (1) constructive fraud;
3 (2) violations of the California Unfair Competition Law ("UCL"),
4 (3) negligent infliction of emotional distress, (4) unjust
5 enrichment, and (5) quiet title.

6 Defendant removed this action to federal court on diversity
7 grounds and now moves to dismiss the complaint in its entirety.
8 Not. of Removal; ECF No. 5 ("MTD"). The Motion is fully briefed.
9 ECF No. 13 ("Opp'n"), 14 ("Reply"). The Court finds this matter
10 appropriate for determination without oral argument. For the
11 reasons set forth herein, the Court GRANTS the Motion and DISMISSES
12 the Complaint WITH LEAVE TO AMEND.

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14 **II. DISCUSSION**

15 **A. Legal Standard for Motions to Dismiss**

16 A motion to dismiss under Federal Rule of Civil Procedure
17 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
18 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based
19 on the lack of a cognizable legal theory or the absence of
20 sufficient facts alleged under a cognizable legal theory."
21 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
22 1988). "When there are well-pleaded factual allegations, a court
23 should assume their veracity and then determine whether they
24 plausibly give rise to an entitlement to relief." Ashcroft v.
25 Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court
26 must accept as true all of the allegations contained in a complaint
27 is inapplicable to legal conclusions. Threadbare recitals of the
28 elements of a cause of action, supported by mere conclusory

1 statements, do not suffice." Id. at 663 (citing Bell Atl. Corp. v.
2 Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a
3 complaint must be both "sufficiently detailed to give fair notice
4 to the opposing party of the nature of the claim so that the party
5 may effectively defend against it" and "sufficiently plausible"
6 such that "it is not unfair to require the opposing party to be
7 subjected to the expense of discovery." Starr v. Baca, 633 F.3d
8 1191, 1204 (9th Cir. 2011).

9 **B. The Origination of Plaintiffs' Loan**

10 Defendant's lead argument is that each of Plaintiffs' claims
11 fail because BofA was not the originating lender on Plaintiffs'
12 loan. See MTD at 3-4. Defendant asks the Court to take judicial
13 notice of the Deed of Trust securing Plaintiffs' promissory note,
14 which states that the lender is Quality Home Loans. ECF No. 5
15 (Request for Judicial Notice ("RJN")) Ex. A. The Court may take
16 judicial notice of the Deed of Trust as it is a public document,
17 its contents are "not subject to reasonable dispute," and
18 Plaintiffs rely on the document in their Complaint. See Fed. R.
19 Ev. 201; Shaterian v. Wells Fargo Bank, N.A., 829 F. Supp. 2d 873,
20 877 n.2 (N.D. Cal. 2011) (taking judicial notice of a deed of
21 trust). However, at the pleading stage, the Court is not prepared
22 to find that BofA and its predecessors-in-interest are unrelated to
23 Quality Home Loans or are otherwise strangers to Plaintiffs' loan
24 based on the Deed of Trust alone. Thus, the Court declines to
25 dismiss the Complaint on these grounds. Nevertheless, the Court
26 notes that Plaintiffs' allegations regarding BofA's relationship to
27 the subject loan could be improved. Accordingly, Plaintiffs'
28

1 amended complaint should specifically allege BofA's relationship to
2 the origination of Plaintiffs' loan.

3 **C. Statute of Limitations**

4 Defendant also moves to dismiss Plaintiffs' claims for fraud,
5 violations of the UCL, and negligent infliction of emotional
6 distress as time-barred. MTD at 4, 6. The statute of limitations
7 for fraud claims is three years, Cal. Code Civ. Proc. § 338(d), the
8 statute of limitations for UCL claims is four years, Cal. Bus. &
9 Prof. Code § 17208, and the statute of limitation for claims for
10 negligent infliction of emotional distress is two years, Cal. Code
11 Civ. Proc. § 335.1. Defendant argues that these statutes of
12 limitations have run since Plaintiffs allege that their loan
13 originated in 2006 and they did not file this suit until 2012. MTD
14 at 4, 6. Plaintiffs argue that it is unfair to allow Defendant to
15 argue that the limitations period has expired because Plaintiffs
16 did not discover the harm until 2012. Opp'n at 1.

17 Plaintiffs appear to be trying to invoke California's
18 "discovery rule," which delays the accrual of a cause of action
19 until a plaintiff either became aware of the injury and its cause
20 or could have discovered the injury and cause through reasonable
21 diligence. See Fox v. Ethicon Endo-Surgery, Inc., 35 Cal. 4th 797,
22 807-08 (Cal. 2005). In order to rely on the discovery rule, "[a]
23 plaintiff whose complaint shows on its face that his claim would be
24 barred without the benefit of the discovery rule must specifically
25 plead facts to show (1) the time and manner of discovery and (2)
26 the inability to have made earlier discovery despite reasonable
27 diligence." Id. at 808 (internal quotation omitted).

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1 As pled, the Complaint clearly fails to satisfy either of the
2 elements of the discovery rule. Accordingly, Plaintiffs cannot
3 state claims for fraud, violations of the UCL, or negligent
4 infliction of emotional distress. Those claims are hereby
5 DISMISSED. The Court GRANTS Plaintiffs leave to amend to
6 specifically allege the time and manner of the discovery of
7 Defendant's alleged misconduct, as well as their inability to have
8 made an earlier discovery.

9 D. **Fraud**

10 Defendant argues that Plaintiffs' fraud claim fails for the
11 additional reason that it is pled with insufficient particularity.
12 Rule 9(b) of the Federal Rules of Civil Procedure requires that
13 fraud be pled "with particularity," meaning that the plaintiff must
14 allege "'the who, what, when, where, and how' of the misconduct
15 charged." See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106
16 (9th Cir. 2003). Plaintiffs respond that the requirement of
17 specificity in a fraud claim is relaxed when the allegations
18 establish that "the defendant must necessarily possess full
19 information concerning the facts of the controversy." Opp'n at 2
20 (quoting Bradley v. Hartford Acc. & Indem. Co., 30 Cal. App. 3d
21 818, 825 (Cal. Ct. App. 1973)). As Defendant points out, it is not
22 clear from the Complaint that Defendant solely possessed the
23 relevant facts here as Plaintiffs have not specifically pled BofA's
24 role in the origination of their loan. Accordingly, consistent
25 with Rule 9(b), Plaintiffs' amended complaint should plead the
26 "who, what, when, where, and how" of the misconduct charged.

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1 **E. UCL violations**

2 The UCL prohibits any business act or practice which is: (1)
3 unlawful, (2) unfair, or (3) fraudulent. Cal. Bus. & Prof. Code §
4 17200. Defendant argues that Plaintiffs' UCL claim is
5 insufficiently pled because Plaintiffs have not alleged the
6 specific rubric under which the alleged misconduct falls. MTD at
7 7. Plaintiffs do not offer a coherent response to this argument
8 and the Court finds that it has merit. Accordingly, Plaintiffs'
9 amended complaint should specifically identify which prong(s) of
10 the UCL Defendant allegedly violated and provide specific factual
11 allegations supporting each alleged violation.

12 **F. Negligent Infliction of Emotional Distress**

13 Defendant argues that Plaintiffs' claim for negligent
14 infliction of emotional distress is also insufficiently pled.
15 Specifically, Defendant contends that Plaintiffs failed to plead
16 facts that would establish that Defendant owed them some type of
17 duty. Under California law, a financial institution "owes no duty
18 of care to a borrower when the institution's involvement in the
19 loan transaction does not exceed the scope of its conventional role
20 as a mere lender of money." Nymark v. Heart Fed. Savs. & Loan, 231
21 Cal. App. 3d 1089, 1096 (Cal. Ct. App. 1991). Here, Plaintiffs
22 have not pled how Defendant stepped out of its conventional lending
23 role. Indeed, it is not clear from the Complaint what role
24 Defendant or its predecessors-in-interest had in originating
25 Plaintiffs' loan. To state a claim for negligent infliction of
26 emotional distress, Plaintiffs' amended complaint should include
27 additional factual allegations concerning BofA's involvement in the
28 loan transaction.

1 **G. Unjust Enrichment**

2 Defendant argues that Plaintiffs' claim for unjust enrichment
3 fails because BofA was not the originating lender on Plaintiffs'
4 loan. MTD at 9. This argument is addressed in Section II.B
5 supra.¹ Plaintiffs' unjust enrichment claim is DISMISSED with
6 leave to amend.

7 **H. Quiet Title**

8 Finally, Defendant moves to dismiss Plaintiffs' claim for
9 quiet title on the ground that Plaintiffs do not allege that they
10 have tendered or have offered to tender the outstanding balance on
11 the subject loan or that they have the ability to do so. MTD at
12 10. Plaintiffs argue that the court should waive the tender
13 requirement since it would be inequitable in these circumstances.
14 Opp'n at 4. While California courts have not required tender where
15 it would be inequitable to impose such a condition, see Lona v.
16 Citibank, N.A., 202 Cal. App. 4th 89, 113 (Cal. Ct. App. 2011),
17 Plaintiffs have not pled sufficient facts to invoke this exception
18 to the tender rule here, cf. Humboldt Sav. Bank v. McCleverty, 161
19 Cal. 285, 291 (Cal. 1911) (finding that it would be inequitable to
20 require defendant to pay a debt of \$57,000, for which she was in no
21 way liable, to attack the sale of her \$5,000 homestead). To the
22 extent that Plaintiffs are arguing that the tender requirement
23 should be waived because their debt was induced by fraud, they have
24 also failed to allege sufficient facts. See Section II.D. supra.
25 Plaintiffs' amended complaint should either allege their

26 ¹ Defendant argues that Plaintiffs' unjust enrichment also fails
27 because it is not part of a "quasi-contract claim." MTD at 9. The
28 Court declines to address this argument since the only authority
Defendant offers in support of it either does not exist or is
incorrectly cited in Defendant's brief.

1 willingness and ability to tender or allege sufficient facts to
2 invoke one of the exceptions to the tender rule.

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4 **III. CONCLUSION**

5 For the foregoing reasons, the Court GRANTS Defendant BofA's
6 motion to dismiss. The Court DISMISSES WITH LEAVE TO AMEND each of
7 the claims set forth in Plaintiffs Tricia Reyes-Aguilar and Edward
8 Aguilar's Complaint. As Defendant has yet to foreclose on
9 Plaintiffs' property and Plaintiffs have expressed an interest in a
10 loan modification, this dispute may be better resolved by the
11 parties. Accordingly, the Court directs the Clerk of the Court to
12 refer this matter to court-sponsored mediation. If the parties
13 fail to reach an agreement within ninety (90) days of this Order,
14 Plaintiffs shall file an amended complaint consistent with the
15 guidance set forth above. Failure to do so will result in
16 dismissal of this action with prejudice.

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18 IT IS SO ORDERED.

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20 Dated: September 14, 2012



21 UNITED STATES DISTRICT JUDGE

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